Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-996

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

DATA PRODUCTS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

DATA PRODUCTS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The judgment of the district court (Appendix A, *infra*) is not officially reported. The order of affirmance of the court of appeals (Appendix B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1974 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Although respondent was the succesful party below, it has filed a petition for a writ of certiorari (No. 74-854) to review the decision of the court of appeals. We are filing simultaneously with this petition a memorandum in opposition to respondent's petition.

QUESTION PRESENTED

Section 172 of the Internal Revenue Code of 1954 permits the carryback of a net operating loss to a taxable year prior to the year in which the loss is sustained, and a carryover to a succeeding year of the amount, if any, by which the loss exceeds the taxable income for each prior year to which the loss may be carried.

The question presented is whether, in carrying back a net operating loss to a year in which the taxpayer had both ordinary income and capital gains and employed the alternative tax computation method of Section 1201, the loss deduction available for carryover to a succeeding year is the amount by which the loss exceeds only the ordinary income for the prior year, as the decision below held, or the amount by which the loss exceeds both the ordinary income and capital gains for the prior year.

STATUTES INVOLVED

The relevant portions of Sections 172 and 1201 of the Internal Revenue Code of 1954 are set forth in Appendix D of the petition for a writ of certiorari in *United States* v. *Foster Lumber Company, Inc.*, No. 74-799.

STATEMENT

For its taxable years ended March 31, 1968 through 1971, respondent reported the following amounts of ordinary and capital gains income:[2]

[2]In granting the judgment for respondent, the district court did not make any findings of fact. The court of appeals summarily affirmed prior to the filing of briefs or a record appendix. Accordingly, the Statement is based on the undisputed facts as set forth in the original record.

Taxable Year	Net Ordinary Income	Excess of Net Long-Term Capital Gain Over Net Short-Term Capital Loss	Total Taxable Income
1968	$2,683,774	_____	$ 2,683,774
1969	$ 560,746	$18,095,643	$18,656,389
1970	$ 662,604	_____	$ 662,604
1971	($8,818,189)	_____	($ 8,818,189)

Because respondent sustained a net operating loss of $8,818,189 for its taxable year 1971, it elected to carry back that loss to 1968, and filed a Form 1139 (Corporation Application for Tentative Refund from Carryback of Net Operating Loss). That carryback resulted in the complete offset of respondent's 1968 taxable income, leaving a net operating loss of $6,134,415 available to be carried over to 1969. As the Code prescribes, respondent recomputed its 1969 tax liability under both the method provided by Section 11 (the so-called "regular method"), and the "alternative tax computation method" provided by Section 1201 of the Code. Taking into account the carryback of its 1971 losses in the amount of $6,134,415, respondent's computations of its 1969 income tax liability under each of the two methods were as follows:

"Regular Method" (Section 11)

Taxable Income (excluding net operating loss deduction):		
Ordinary income	$ 560,746	
Capital gains income	18,095,643	$18,656,389
LESS: Net operating losses deduction resulting from carryback of 1971 net operating loss		6,134,415

Taxable Income (Section 63(a))		$12,521,974
Regular tax (1969 rates)		$ 6,003,548

"Alternative Method" (Section 1201)

Taxable Income (excluding net operating loss deduction):		
Ordinary income	$ 560,746	
Capital gains income	18,095,643	$18,656,389
LESS: Net operating loss deduction resulting from carryback of 1971 net operating loss		6,134,415
Taxable Income (Section 63(a))		$12,521,974
(Step 1 - Partial Tax)		
LESS: Excess of net long-term capital gain over net short-term capital loss		18,095,643
Balance		($ 5,573,669)
Partial Tax at Section 11 rates on balance (Section 1201(a)(1))		- 0 -
(Step 2 - Capital Gains Tax)		
PLUS: Capital Gains Tax at flat 25 percent rate on excess of net long-term capital gain over net short-term capital loss (Section 1201(a)-(2))		4,523,911
Alternative Tax (1969 rates)		$ 4,523,911

Since the $4,523,911 tax computed under the "alternative method" of Section 1201 was lower than the tax computed under the "regular method" of Section 11, respondent was required to and did report the amount of the alternative tax computed under the provisions of Section 1201 as its recomputed 1969 tax liability.

This suit involves respondent's tax liability for its taxable year ended March 31, 1970. In applying for a tentative refund from the carryover of its 1971 net operating loss to that year, respondent claimed that $5,573,669 of its 1971 loss of $8,818,189, which had been first carried back to 1968 (reducing the loss to $6,134,415), and then to 1969, was available to offset income for 1970. Respondent based its claim on the contention that its 1971 loss had been reduced in 1969 only to the extent of its ordinary income of $560,746 for that year.

On audit, the Commissioner of Internal Revenue disallowed respondent's claim for refund for its taxable year 1970. The Commissioner's disallowance was premised on the ground that respondent's 1971 net operating loss of $8,818,189 had been entirely "used" in computing its 1968 and 1969 taxable income in the respective amounts of $2,683,774 and $18,656,389. As a result, the Commissioner determined that no part of the 1971 net operating loss deduction remained available to respondent for its taxable year 1970.

The district court upheld respondent's claim for refund (Appendix A, *infra*), and the court of appeals summarily affirmed (Appendix B, *infra*).

REASONS FOR GRANTING THE WRIT

This case presents the identical issue as *United States* v. *Foster Lumber Company, Inc.*, 500 F.2d 1230 (C.A. 8), petition for a writ of certiorari pending, No. 74-799.

For the reasons stated in our petition for a writ of certiorari in *Foster Lumber*, a copy of which we are furnishing to respondent's counsel, the decision below is in square conflict with *Mutual Assurance Society of Virginia Corp.* v. *Commissioner*, 505 F.2d 128 (C.A. 4), and rests upon an erroneous interpretation of the term "taxable income" as it is employed in Section 172(b)(2). That term is defined by Section 63(a) of the Code as gross income less allowable deductions. The court of appeals' conclusion that respondent's 1971 carryback loss was offset only to the extent of its ordinary income for 1968 and 1969 flatly contradicts the definition of that term in Section 63(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 74-238-AAH

DATA PRODUCTS CORPORATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Plaintiff having filed a motion for summary judgment and the Court having been fully advised in the premises and having made and entered its Findings of Fact and Conclusions of Law herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff recover from the Defendant the amount of $152,451, together with interest as provided by law and that there be assessed against Defendant all costs as provided by law.

Dated this 25th day of September, 1974.

A. Andrews
UNITED STATES DISTRICT JUDGE

APPENDIX B

DATA PRODUCTS CORPORATION,

Plaintiff-Appellee,

No. 74-3341

vs.

ORDER

UNITED STATES OF AMERICA,

Defendant-Appellant.

Before: TRASK and GOODWIN, Circuit Judges

The judgment of the district court entered September 25, 1974 is hereby affirmed. *Olympic Foundry Company* v. *United States*, 493 F.2d 1247 (9th Cir. 1974).

Filed December 27, 1974

/s/ Ozell M. Trask

/s/ Alfred T. Goodwin

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DATA PRODUCTS CORPORATION,

Plaintiff-Appellee

v. 74-3341

UNITED STATES OF AMERICA,

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the transcript record from the United States District Court for the Central District of California

and duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same hereby is, affirmed.

Filed and entered December 27, 1974.

[SEAL]

A true copy:

Attest: /s/ Emil E. Melfi, Jr.,

Clerk, U.S. Court of Appeals, 9th Circuit.